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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1272

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL NO. 782, AFL-CIO; KEITH ARMSTRONG; JAMES R. MARTIN; and JACK H. GRAY,

and

GUY R. RYAN, III; LAWRENCE BRUZDA; JAMES R. TODD; INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL NO. 782, on behalf of themselves and others similarly situated,

Petitioners,

vs.

NORRIS OLSON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on December 27, 1976.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is not reported. It appears hereto as Appendix "A".

The opinion of the United States District Court for the District of Kansas is not reported. It is included as Appendix "B".

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on October 29, 1976. Thereafter, a timely motion for reconsideration and/or transfer to the court *en banc* was filed. It was considered by the Court of Appeals and denied on December 27, 1976. This Petition for a Writ of Certiorari is being filed within ninety days of the latter date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. A WRIT OF CERTIORARI SHOULD BE GRANTED TO DEMONSTRATE THAT A CITY'S INTERESTS ARE NOT PARAMOUNT TO THE CONSTITUTIONAL PROCEDURAL RIGHTS GUARANTEED TO A UNION PRESIDENT LAWFULLY ENGAGED IN UNION ACTIVITIES, OTHERWISE THE FOURTEENTH AMENDMENT WILL SUCCUMB TO THE ADAGE THAT "YOU CAN'T BEAT CITY HALL."
2. THE WRIT OF CERTIORARI SHOULD ISSUE TO CORRECT THE CONSTITUTIONAL ERRORS PERMITTED UNDER THE CIRCUMSTANCES WHEN

THE TRIAL COURT'S CONCLUSIONS OF LAW ARE INADEQUATE AND CONTRARY TO THE LAW, ARE NOT SUPPORTED BY THE FINDINGS OF FACTS AND THE TENTH CIRCUIT ADMITS CONSTITUTIONAL DEPRIVATIONS OF GUARANTEED RIGHTS.

3. THE WRIT OF CERTIORARI WILL PROVE THAT THE FIRING OF A UNION PRESIDENT UPON "GENERAL CHARGES" CONFLICTS WITH OTHER DECISIONS, AND CAUSES AN IMPERMISSIBLE CHILL OF FIRST AMENDMENT FREEDOMS BY CONSTITUTIONALLY IMPAIRING ALL UNION PRESIDENTS SO AS TO MAKE THEM FEARFUL OF PERFORMING THEIR UNION DUTIES.

STATEMENT OF THE CASE

This was an action brought under 42 U.S.C. Section 1983 and the First and Fourteenth Amendments to the U. S. Constitution.

Petitioners here (appellants and plaintiffs below) are Local 782 of the International Association of Fire Fighters, hereafter Union, and certain of its members. All Individual Petitioners were employed by the City of Salina, Kansas, as Fire Fighters.

Respondent Norris Olson is the City Manager of Salina, Kansas.

Witnesses

For the convenience of this Court, the following is a listing of all Witnesses and their particular position or title:

Name of Witness	Position or Title
Armstrong, Keith	Former Fire Fighter, Petitioner
Ashton, Leon	City Commissioner
Beach, Gerald	Fire Equipment Operator
Bross, Eugene	Acting Fire Chief
Bruzda, Larry	Fire Equipment Operator
Cain, Bernard	Retired Fire Lieutenant
Caswell, Russell	Fire Lieutenant
Dunn, James	Fire Captain
Freeman, Lonnie	Fire Lieutenant
Glendening, Byrl	Fire Captain
Gott, Thomas	Fire Equipment Operator
Gray, Jack	Retired Fire Captain
Harris, William	Deputy City Manager
Hindeman, Gary	Police Sergeant
Labbe, David	Fire Equipment Operator
Lacy, James	Former Fire Chief
McCabe, Charles	Fire Captain
McCabe, Hobart	Former Director of Safety
Milliken, Donald	Former City Commissioner
Newsome, David	Former City Employee
Nichols, Gordon	Assistant Fire Chief
Olson, Norris	City Manager, and Respondent
Todd, James	Fire Fighter
Vaupel, William	Fire Captain
Wilson, Darrell	Assistant Chief of Police
Woody, John	Chief of Police
Yost, William	Former City Commissioner

Initially, specific relief was sought for three individual Fire Fighters who had been fired or forced to retire because of union activity.

Upon appeal to the Tenth Circuit, two of the individuals were dropped so that the present situation relates solely to Keith Armstrong. He was President of the Union at all times involved herein.

The appeal contends that Armstrong's civil rights were violated because he and/or members of the Fire Fighters' Union:

(a) Contacted City Commissioners on Fire Department matters,

(b) Contacted other elected officials,

(c) Wrote letters to newspapers and other media,

(d) Circulated initiative petitions among Salina citizens,

(e) Requested through channels certain fringe benefits including vacations, working conditions, etc.,

(f) Freely expressed their opinions of City officials,

(g) Filed lawsuits against the City,

(h) Hired attorneys to check into City's wrongdoings, and were

(i) Threatened with dismissal if the wives of Fire Fighters did any of the foregoing.

Several meetings were held at the instance of City Manager Olson and/or his subordinates on:

(a) February 5, 1970,

(b) February 11, 1970,

(c) March 13, 1970, and

(d) July 20, 1970.

The stated purpose of three of the meetings was to find ways to "fire four or five union men including Armstrong".

On February 5, 1970, City Manager Olson issued written instructions under which HE INSTRUCTED FIRE DEPARTMENT OFFICIALS TO FIRE, DEMOTE, REFUSE TO PROMOTE, REPRIMAND AND OTHERWISE WHIP THE UNION MEN INTO SHAPE AND GET INITIATIVE PETITIONS OFF THE STREET. The Hon. George Templar, Trial Judge, found that "Olson fully intended that the petitions and writings (to elected officials) be stopped or the men were to be fired".

The Fire Fighters were forced to fill out and sign certain questionnaires as to "are you happy with your job", "what would you do if you lost it", etc.

Star Chamber

Armstrong was first suspended for two weeks in February 1970, and later fired on January 6, 1971 as the result of certain "Star Chamber" proceedings.

City Manager Olson under statutory authority caused the five elected City Commissioners to conduct an extensive hearing into and investigation of the Fire Department problems. The hearings commenced in the Fall of 1970 and concluded in January, 1971. All Fire Fighters and many City officials appeared before the Commissioners. They were not permitted to have counsel but their testimony was recorded. Nearly 2,000 pages of such testimony was received in evidence by Judge Templar. Fire Fighters appearing before the Commissioners were urged to tell everything they knew, INCLUDING RUMOR AND HEARSAY.

The most singularly important points coming out of about 2,000 pages of such testimony were these:

(a) Nearly every witness stated the MAJOR SOURCE of TROUBLE in the Fire Department was the McCABE BROTHERS, and

(b) Not one adverse statement was offered regarding Keith Armstrong.

Union Activities

Nearly every Fire Fighter was asked about his union membership, how many attended union meetings, what was said, and the like.

In an effort to shorten the trial, the attorneys for the parties stipulated:

That if the remaining 42 members of the Fire Department whose names appeared on the stipulation were called to testify, each would state that he was asked one or more of these questions at the Commission hearing:

(1) Are you a member of Local 782

(2) Did you vote on the censure resolution or have an opportunity to do so

(3) How long have you been a member of 782

(4) What are the monthly dues to belong to 782

(5) How many men attend union meetings and/or

(6) How many Salina Fire Fighters belong to Local 782?

Previous Determination by Court

As the result of an *in camera* examination of 24 individual commission transcripts, the Trial Court determined on February 8, 1974, that "almost without exception there is an underlying reference to the matter of union activity and union membership" running through them.

Petitions, Letters to Officials and News Media Prohibited

Salina has no rules, regulations, statutes, ordinances or any like provisions which prevent Fire Fighters from any of the following actions:

(a) Writing letters to City Commissioners,

(b) Writing letters to news media,

(c) Preparing, signing and/or passing initiative petitions relating to any subject, including changing the form of city government, the City Manager, or replacing the City Manager,

(d) Talking to or contacting city or state elected officials, or

(e) Any of the foregoing being done by the wives, children or families of Fire Fighters.

Orders by City Manager

City Manager Olson ordered that the Fire Fighters be INSTRUCTED:

Wives of Fire Fighters could not pass petitions, nor could Fire Fighters discuss department business with their wives.

Ordered petitions off the street by 8:00 on 3-14-70 and said petitions were against city regulations, but could not cite any regulation to support such statement.

Fire captains told they were responsible for actions of men, even when the men were off-duty.

Larry Bruzda told to pass the word that any Fire Fighters (or their wives) passing petitions would be fired and Lacy could do nothing to stop it. He, Wright and Armstrong took petitions to city dump and burned them.

They lost their constitutional rights to pass petitions, "bitch", etc., when they became Fire Fighters.

Meeting of 2-5-1970

A meeting was conducted on 2-5-1970 by City Manager Olson.

In attendance were the McCabe Brothers, Lacy, Harris, Dunn, Bross, Vaupel, Gray, Glendening, plus 9 other department heads and the City Attorney.

Olson conducted the meeting and gave out copies of his memorandum entitled "Summary of Meeting Conducted by the City Manager February 5, 1970, relative to personnel and supervisory problems within the Fire Department." The memorandum was received in evidence as Plaintiffs' Exhibit 9.

Exhibit 9 was a nine page document on legal size paper and it dealt mainly with Fire Department matters.

Chief among the instructions given by Olson were these:

Paragraph	Covering
7-(m)	The supervisors would be held accountable for the actions and/or acts of personnel under them, including * * * writing letters to the editors, issuing complaints to Commissioners, etc.
7-o	Failure to discharge your responsibilities may result in disciplinary action for self or men. Such action to include reprimand, probation, demotion, suspension, discharge or any combination with or without pay.
7-u	If you have any problem children, know-it-alls, loud mouths, rebels, etc., if they don't fit, recommend they be turned out to pasture.
8	IF UNION GETS INTO TROUBLE, THE ONLY RECOURSE IS TO DEAL WITH THE OFFICERS OF THE UNION.

Analysis of Instructions

Any fair analysis of the instructions as given and understood by those receiving Plaintiffs' Exhibit 9 clearly indicates that Olson fully intended that the petitions and writings be stopped or the men were to be fired.

Meeting of 2-11-1970

Meeting conducted by Olson in his office.

Present were Olson, Harris, Lacy, Hobart McCabe, and all Fire Captains. Also present from the Union were: Armstrong, Kriegh, Wright, Bowels, and Labbe.

Request

Armstrong had sent a request through "chain of command" asking for a meeting between the Manager and the Union.

Meeting

Olson opened the meeting demanding to know if the Union or Fire Department had requested the meeting. When Armstrong tried to answer, Olson told him to shut up.

During the meeting, Armstrong was polite and courteous, but whenever he tried to talk, Olson told him to shut his mouth or be thrown out of the meeting.

Again, Olson wanted letters of satisfaction with jobs to be written. He produced files showing backgrounds and former jobs of Fire Fighters and discussed such information freely.

Warning

The men were warned that if they discussed the situation or went to Commissioners, he would change their work schedule so they would have to work longer hours.

Upon questioning by Charles McCabe, Hobart McCabe stated that union men who were at the top of their salary range and who could not get merit increases because of that fact would be remembered at promotion time and that a record would be made of their passing the petitions.

Meeting of 3-13-1970

The meeting was taped by Hobart McCabe who testified that his tape recorder "konked out" on him and did not record at all.

Also present were: Lacy, Captains Dunn, McCabe, Bross, Glendening, Vaupel, Assistant Chief Nichols and Lt. Freeman.

Orders From Hobart McCabe

Those present told to get petitions off streets by 8:00 AM or be fired.

Must interview each man on shift and ask them to fill out questionnaires like Pl. Exhibits 4, 18, 35.

Captains had to write back letters indicating compliance by all men or the captains would be fired.

Letters recommending the firing of Caswell, Armstrong, Martin, Tinkler and others were to be written by Captains.

Told to tell men they could not write letters to editors and were advised that the initiative petitions violated department procedure.

Every man to be responsible for his wife's actions, and no letter writing or talking to Commissioners.

Captains must do their jobs as he outlined or be fired.

Anyone striking would be automatically fired.

Questionnaire

The questionnaire arising out of the meeting of 3-13-1970 generally covered the following questions:

1. Are you happy with your job

2. Do you think about your income and what you would do if you lost your job

3. If you are passing petitions, will you stop

4. Will you strike

5. Will you help Lacy and others build a better department

6. Do you want to be a fireman.

Meeting of 3-18-1970

Generally conducted by Lacy and Nichols. Hobart McCabe also present.

Objections Made

Captains objected to Police Chief digging through individual files of Fire Fighters.

Purpose

Those present told purpose was to find ways to fire Martin, Caswell, Armstrong, Purney, Tinkler and others.

Union and Activity

Statements by Olson's Representatives

Told Dunn he could not be a captain and be in union.

He and Lacy wanted to know what went on at union meeting, who was there, who said what and how votes went.

Told Fire Fighters he had a direct leak to union meetings.

Asked Brockway at bowling alley to spy on union meetings for him.

Testified petitions to oust Olson were union activity.

Told Glendening to tell his men to get out of union.

David Newsome, who was never a Fire Fighter, testified that Olson had told men at City Garage that if they talked about unions, they could look for other jobs as he did not like unions and did not want them in Salina.

Deputy City Manager Harris read to the Court a statement given at the Commission Hearing. He stated he had total opposition to unions, their thinking and their activities.

Lacy testified that Foster was a troublemaker, but was not fired because he was non-union. Also said that when the Union stopped fighting and stopped the petitions, the City did not stop the fight and decided to cut the merit increases.

Punishments

For engaging in union activities, punishments were given out as now outlined.

Merit Increases Denied

Lacy told Todd his raise denied because he passed petitions and went to union with his problems.

Hobart McCabe told Todd it was denied because he took his complaints out to the streets and to the general public.

Lacy testified all merit raises frozen for a while in order to pay attorneys to fight litigation commenced by Local 782.

One man reprimanded for talking to state senator.

Lacy raised cain with Caswell for looking for a job - - - and was reminded by Caswell that he was at top of everyone's listing for firing. Caswell lost increase because he called wife of FBI agent who had written favorable article to newspaper.

Captains were repeatedly instructed to write letters and/or find ways to fire Caswell, Martin, Armstrong, and others.

Lacy testified he told men neither they nor their wives could carry petitions, sign them or write letters to news media.

Charles McCabe told his men City Commissioners took away all increases because of problems created by union.

Lawsuits

Hindeman told a Fire Fighter to get name off of lawsuits.

Hobart McCabe wanted to know whose names were on the lawsuits.

Deputy City Manager told Beach he should get his name off the lawsuits because the latter owed his job to Olson.

Lacy rebuked Bruzda because Lacy had received a letter from union attorney.

Illegal and Unauthorized Police Activity

Interrogations at Police Station

All Fire Fighters forced to go to Police Station for questioning about suspected sabotage of city equipment. No man allowed to have an attorney. No Miranda warnings given to any Fire Fighter. Not permitted to take notes. Threatened court action to get notes that Bruzda took during questioning. No rule, regulation, statute, ordinance, etc. requiring men to submit to unauthorized police questioning.

Police Chief Woody

Tapped telephone lines, admitting to at least one.

Todd

Testified Chief Woody at one of his fireside chats at stations said he "would detail names of all Fire Fighters and wives arrested, and dig up so much s .. .. .. (expletive deleted)" that it would ruin the whole Fire Department.

Lacy

Testified he went with Woody to various fire stations and that Woody threatened Fire Fighters with information he had in Police Department files.

He ordered Fire Fighters to report to Police Department for sabotage questioning.

Keith Armstrong

7 year veteran when fired. Earning salary of $541.00 per month when fired on 1-13-1971.

Since firing has been unable to obtain steady work. Now employed as a janitor, and has been a gasoline jockey.

Could not get jobs in Salina, Topeka or Colorado because of firing by City of Salina which gives him a bad record with new firms.

Strictly followed "chain of command" at all times.

Dunn was called on carpet once because he let Armstrong call City Hall and inquire about Olson's salary.

Norris Olson

City Manager of Salina since 1964.

Appointed by action of the City Commissioners and serves at their pleasure.

Has authority to request investigation of any department.

Requested City Commissioners to investigate Fire Department.

He is Chief Administrative Officer for City of Salina, and is SOLELY responsible for all administration of the City.

Testified "action" letter which was brought to him by Lacy was "rank insubordination."

Admitted he had discussed ouster petition with several people.

Also stated he had made survey of Fire Fighters who had said they would not stop passing petitions.

Admitted receiving copies or summaries of the questionnaires.

Said it was "rank insubordination" to write letters to editors.

Said no City employee should even talk to a Commissioner.

Admits he spoke the words and gave the instructions set forth in his summary of 2-5-1970 meeting and particularly that he used the words set out in paragraphs 7-M, O, U and 8.

Admitted it cost the City to lose experienced men.

Stated: "IF I HAD KNOWN ALL THE FACTS AND EVIDENCE YOU HAVE BROUGHT OUT THIS WEEK, MY ACTIONS WOULD NOT BE THE SAME."

Had no explanation for how an out-of-town and out-of-state attorney could dig up such facts when he, as Chief Administrative Officer and top dog in the City Government, could not get them.

Admitted he had NEVER INSTRUCTED SUBORDINATES TO BE CAREFUL NOT TO INJURE THE CIVIL OR CONSTITUTIONAL RIGHTS OF CITY EMPLOYEES.

Admitted that the "action" letter was signed by Armstrong in his capacity as President of the Union and letter was on a union letterhead and no City employee can talk to a City Commissioner without Olson's approval.

Action Letter

Under date of January 6, 1971, Armstrong signed as the President of, and wrote a letter on Local 782's letterhead, the letter being referred to during the trial as the "action" letter. See Appendix B.

Although the "action" letter was addressed to Chief Lacy requesting a meeting on union issues, Lacy gave the letter to Olson and to the City Commissioners who were still "Star Chambering". Four of the City Commissioners were so enraged they wrote Olson on January 11, 1971 recommending Armstrong be fired after he refused to resign. He was fired without any hearing. The City Commissioners, Lacy and Olson readily admitted that the "action" letter was the cause of the dismissal.

REASONS FOR GRANTING THE WRIT

I

A Writ of Certiorari Should Be Granted to Demonstrate That a City's Interests Are Not Paramount to the Constitutional Procedural Rights Guaranteed to a Union President Lawfully Engaged in Union Activities, Otherwise the Fourteenth Amendment Will Succumb to the Adage That "You Can't Beat City Hall."

The most fearful enemy facing this Nation today is the overwhelming power and authority of "Big Brother Government." This cause represents the traditional David trying to slingshot his way to constitutional rights by slaying the Goliath City Hall. Faced with the adage that "You can't beat City Hall," one single, insignificant Fire Fighter keeps hurling his stones, hoping to overcome the barriers denying him his Constitutional rights.

The basic perimeters of procedural due process in the area of public employment were set forth by the Supreme Court of the United States in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and its companion case, *Perry* v. *Sindermann*, 408 U.S. 593 (1972). Speaking for the Court

in *Roth*, Justice Stewart at l.c. 569, 570 stated the following guidelines:

> "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount."

The important task before us is to determine just what are protectible interests within the meaning of liberty and property and, most important, whether or not Armstrong has such an interest in regard to his continued employment.

A logical starting point for commencing this task is a quote from the eminent Justice Frankfurter, referred to by Justice Stewart at l.c. 571 of the *Roth* opinion:

> " 'Liberty' and 'property' are broad and majestic terms. They are among the 'great constitutional concepts' . . . purposely left to gather meaning from experience. . . . They relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."

In examining the evolution of case law in this critical area of the law it becomes immediately apparent that we have not remained stagnant in our society nor has the law remained stagnant in the area of protectible property interests within the realm of the Fourteenth Amendment. From the basic proposition in *Roth* that protected property interests are not limited to those few created by the Constitution, but are instead created and defined by an independent source such as state statutes or rules, we have seen a rapid expansion in due process guarantees. Accordingly, welfare recipients who meet the statutory re-

quirements have a right to continued benefits although no such interest is defined in the Constitution. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Similarly, one has a protectible interest when the government decides to revoke his parole although a parolee has no constitutional right to that status. *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). Most recently the Supreme Court announced that although the Constitution does not command the right of education, once a state chooses to extend such right to the public, it may not withdraw this right absent fundamentally fair procedures. *Goss* v. *Lopez*, 419 U.S. 565 (1975). And important for our purposes, it has been held that one has a protected property interest in continued public employment if he can show a legitimate claim of entitlement thereto, although the Constitution grants no such right. *Board of Regents* v. *Roth*, supra; *Perry* v. *Sindermann*, supra; *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Goss* v. *Lopez*, supra; *Muscare* v. *Quinn*, 520 F.2d 1212 (7th Cir. 1975). The crucial question now becomes—When does a public employee have a legitimate claim of entitlement in continuing that employment?

In *Board of Regents* v. *Roth*, the Supreme Court set forth the fundamental proposition that public office or employment *generally* is held not to be a property interest within the meaning of the Fourteenth Amendment. In *Roth*, the Court held that a non-tenured state university professor serving on a one year contract had no protectible property interest because his expectations of continued employment were merely unilateral. Absent tenure or a multi-year contract, there was no legitimate claim of entitlement.

It appears, however, that the Supreme Court through its recent decision has made a conscious effort to limit the general rule of *Roth* to a narrow ambit where facts show

conclusively that one's employment is held at will or for a specified term with absolutely no right of tenure. *Perry* v. *Sindermann*, decided the same day as *Roth*, proves out the above analysis. In *Perry*, the Court allowed a college professor, whose contract had not been renewed after 10 years of service, to show that while no explicit tenure system existed, a *de facto* tenure system was in force at the university evidenced by various rules and customs. By proving such a de facto tenure system, as subtle as it was, Perry demonstrated his entitlement to continued employment and therefore established a protectible property interest within the purview of the 14th Amendment.

In *Arnett* v. *Kennedy*, the Supreme Court in a plurality opinion announced that a public employee (here a federal employee) has a legitimate claim of entitlement to continued employment where under law, or rules promulgated by lawful officials, he can remain in the public employ absent sufficient cause for discharge. The primary disagreement between the justices related to the scope and extent of Due Process to be afforded to this particular interest.

In *Goss* v. *Lopez*, a majority of the Court speaking through Justice White reiterated the rule of *Arnett* and applied such reasoning to the area of education. Justice White explains that although a state is not compelled under the Constitution to provide a right of education, once the state undertakes such a task, said right cannot be withdrawn on vague grounds of misconduct or cause, absent fundamentally fair procedures to determine whether in fact these abstract charges have substance. *Goss* is especially significant because the statute authorizing public education did not authorize any standards for dismissal, yet such was not interpreted by the Court as

meaning that these kids could be dismissed at will. A careful analysis of this decision reveals a detetrmined effort on the part of the Supreme Court to extend the protections of Due Process to all basic interests conferred on the public by the state, whether or not such interests are constitutionally commanded or the standards for discharge codified.

It did not take the Circuits long to build on the basic ruling of *Goss* and *Arnett*. In *Muscare* v. *Quinn*, supra, the Seventh Circuit relied heavily on *Goss* in holding that Plaintiff, a fireman, a twenty year veteran of the civil service, had a protected interest in his employment under a state statute providing that a civil service employee could only be removed, discharged, or suspended for cause upon written charges after an opportunity to be heard. The Seventh Circuit went even further than past decisions in defining the scope of procedural Due Process owed. The Court held that a fireman suspended for only 29 days still had a right to procedural Due Process, which at a minimum, required a hearing prior to suspension. At such hearing the employee should be fully informed of the reasons for the suspension and he should be given ample opportunity to challenge their sufficiency. The Court emphatically rejected the contention that a postsuspension review before the Civil Service Commission was sufficient to meet Due Process requirements.

It is very fitting that *Muscare* is one of the most recent cases to come down from the Courts on this issue as the factual similarities between *Muscare* and the case at bar are at once easily recognizable. In both cases we deal with a discharged and/or suspended fireman. In both cases we have a public employee who has alleged that his First Amendment rights were infringed upon in that ultimate dismissal or suspension was recommended for exercise of these rights. In *Muscare* we deal with a Civil Service Removal Statute much the same as exists in the City of Salina Personnel Manual, Chapter 4, Section IV-2. In relevant part the rule limits removal of a fireman except for just cause after notification in writing of the reasons for suspension or removal. See Appendix F.

The rule in the Salina Personnel Manual, cited above, was not officially adopted until January 25, 1971 while Armstrong's discharge became official some 10 days earlier. However, Petitioners believe such subterfuge cannot serve to defeat protectible interests in continued employment and right to Due Process under the law. The Supreme Court's decision in *Goss* as well as general notions of Equal Protection command this result.

The philosophy of the State of Kansas is clearly set out in K.S.A. 13-788 (App. D) which deals with the removal of firemen. The statute is nearly identical to that judicially found to confer a property right in *Muscare* and *Arnett*. There is little doubt that such a statute in and of itself is the key link in finding a protectible property interest in continued public employment at least so far as *Arnett* and *Muscare* are concerned. While we recognize that the State of Kansas may properly allow its individual municipalities to elect whether or not to come under many varied state provisions, it offends all notions of Equal Protection to allow cities of the same classification within a state to elect whether or not they will afford Due Process guarantees. This is in effect the result of allowing the election promulgated under K.S.A. 13-772 (App. D). Looking at the statute as a key link in finding a protectible property interest, the State literally allows its first class cities to elect whether or not to observe constitutional safeguards. If Armstrong had fortuitously been employed in Topeka or Wichita, he would have fallen under the statute. Such

a scheme cannot be allowed to exist. There appears no compelling interest on the part of the state for differentiating between cities of the same statutory classification, especially in the area of constitutional safeguards.

The Supreme Court's decision in *Goss* can easily be read to mean that such a statute, as discussed above, is no longer necessary to provide the key link in making continued employment a protectible property interest. The *Goss* decision implies that continued employment *absent cause* is inherent in all basic rights granted by a state, though not commanded in the first place by the Constitution. As with education, the State did not have to afford public employment to Armstrong, but the fact that it has once seen fit to confer such a benefit, it cannot strip him of this benefit absent an opportunity to answer his charges. We feel the case at bar is completely distinguishable from *Roth* in that Armstrong was not working under a short-term contract. Additionally the instant case is distinguishable from the case of *Abeyta* v. *Town of Taos*, 499 F.2d 323 (10th Cir. 1974), relied on by the Court below. *Abeyta* was wholly disposed of before the decision in *Goss* was handed down and there was no evidence of a philosophy such as exists in Kansas where a Court could draw the conclusion that public employment is not held purely at will.

Additionally, this Court's recent ruling in *Bishop* v. *Wood*, 426 U.S. 341 (1976), should present little interference to our particular situation. Unlike *Bishop*, reference to the Kansas State Law evidences a strong implication of a continued right to public employment. There is no admonition from the Supreme Court of Kansas corresponding to the opinion of the Supreme Court of North Carolina in *Still* v. *Lance*, 182 S.E.2d 403 (1971). The situation in the instant case is more akin to *Arnett*, supra,

where "cause" was the only factor lending itself to discharge and a protectible property interest was found.

We have taken great care in presenting to this Court a detailed evolution of the concept of protectible property interests as it relates to discharged public employees. We spent this effort so the Court could have a clear understanding of the trend toward extending Due Process guarantees to state employees who hold their jobs with a justified expectation of continuance absent sufficiently established cause. We recognize that the District Court, below, did not have the benefit of the decisions in *Goss* and *Muscare* when its findings and conclusions were made. But we urge the Court to follow the lead of the 7th Circuit in *Muscare* and take notice of these decisions in this appeal. To find a right of entitlement to continuing public employment in the case at hand is certainly no more difficult than finding a scheme of *de facto* tenure as in *Perry* v. *Sindermann*, supra. We ask the Court to give credence to the rulings in *Arnett, Goss, Muscare* and all the other relevant cases cited and to take note of the trend toward expanding the protectible property interests that require Due Process guarantees. We ask the Court to afford Armstrong the procedural Due Process he constitutionally has a right to expect.

Although we might end the Due Process discussion here, we would be remiss in not briefly pointing out that Armstrong also has a protectible liberty interest within the purview of the 14th Amendment, an interest that the Court erroneously failed to recognize below.

As with the concept of protectible property interests, the area of protectible liberty interests has not remained static in our fast changing society. We again look to *Roth* for the basic proposition in regard to liberty interests

and their relationship with Due Process safeguards. The Court in *Roth* announced that a public employee is deprived of liberty if the state damages his standing in the community or his reputation therein by the actions they commence. In *Roth,* such damage was thought to be limited to charges bearing on veracity and character. Since *Roth,* the Federal Courts have expanded the area of charges that may be damaging to future employment and have broadened the scope of such terms as reputation and community standing.

In *Chitwood* v. *Feaster,* 468 F.2d 359 (4th Cir. 1972), the Court stated that a teacher who claimed that the nonrenewal of his contract was the result of objections to constitutionally protected speech was entitled to a hearing and a determination whether or not the activity protected by the First Amendment was the cause of the employment termination. The Fourth Circuit distinguished *Roth* where no Free Speech claim was before the court. The Fourth Circuit hinted that although Free Speech might be curbed in some instances by the state, any discharge based on a First Amendment Right raises in and of itself certain protectible liberty interests.

In *Crawford* v. *City of Houston, Texas,* 356 F. Supp. 187 (1974), the United States District Court for the Southern District of Texas held that a liberty deprivation was involved when a public employee was suspended for alleged protected speech with a resulting inability to locate future employment. The resulting inability in *Crawford* substantially parallels the plight of Armstrong in the current case.

Of even broader impact is the decision handed down in *Simmonds* v. *Government Employees' Service Commission,* 375 F. Supp. 934 (D. Virgin Islands 1974). In this case a public employee was dismissed on charges of "in-

subordination" and "continual disregard for department rules and regulation." Identical charges were made against Armstrong. The Court held that due to the fact such charges were placed on Plaintiff's permanent record, the stigma attached to these charges, without sufficient opportunity to contest them, deprived Plaintiff of his Due Process protection in liberty. The Court held that such charges could put a cloud on Plaintiff's name, integrity, reputation and honor. In addition such charges raised doubts about the person's loyalty and might easily have damaged his standing in the community. Not to mention, effectively foreclosed him from seeking other governmental employment.

In the recent Supreme Court case of *Goss* v. *Lopez* discussed earlier, the Court was very concerned with the arbitrary Deprivation of Liberty that might occur when a student is dismissed from school on the vague charge of misconduct. The Supreme Court reiterated and expanded upon the basic proposition in *Roth* and announced at l.c. 576:

> "The Due Process Clause also forbids arbitrary deprivations of liberty. 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him', the minimal requirements of the clause must be satisfied."

The Supreme Court held that simple charges such as misconduct, if sustained and recorded, could seriously damage the plaintiffs' standing with their teachers as well as interfere with later opportunities for higher education and employment.

So it is in our case, as it was in *Simmonds* and *Goss,* that a Plaintiff, the recipient of a public benefit (employment or education), is stripped of such benefit on vague

grounds of Insubordination, Misconduct, Demanding Attitude and Failure to follow established procedures. As demonstrated above, these abstract charges can clearly carry a lasting stigma which could irreparably harm Armstrong's name, reputation, and honor. Such charges carry the connotation of "troublemaker", a term intensified by a factual backdrop of active Union participation. Such charges have a different effect than those which allege inadequate work performance and are backed up by examples of everyday incompetency. *Abeyta* v. *Town of Taos,* supra. The record and findings here are devoid of any evidence bearing on Armstrong's daily competency as a fire fighter. In fact, everyone testified he was a good fire fighter!

Nor, should this Court's recent ruling in *Bishop* v. *Wood,* supra, control the liberty issue. Armstrong has demonstrated that he did not hold his position at the mere will of the City. It should also be noted that the circumstances and publicity surrounding this case led to a substantial presumption that the reasons for Armstrong's discharge were made public. The reasons were certainly a matter of record for all potential employers to agonize over. It can hardly be asserted that the ordinance involved in *Bishop* does not require some explanation of why the employee's work is not satisfactory and why an ultimate discharge should follow. Hollow accusations of "unsatisfactory work" can be no more permissible than vague shouts of "insubordination". Even the written notice of discharge, calling for reasons to be set forth, surely requires something more substantial lest it be impossible for a potential employer to evaluate his future prospect.

It should be pointed out that Armstrong has already been foreclosed from similar governmental employment because of the stigma discussed. The City of Topeka,

Kansas turned down his bid for employment although he qualified in every respect for a fire fighter's position . . . simply because of his Salina record.

As *Simmonds* and *Goss* point out, the Courts must not be blind to the devastating effect of abstract charges such as insubordination. The stigma that may attach and the inferences that can be drawn, especially under certain factual situations, are no less damaging than a charge of dishonesty or immorality. We must recognize the ease with which such charges may be leveled. We must seek to substantiate such charges. We cannot restrict the perimeters of liberty in this highly vulnerable area of the law. If we do so we only encourage municipal employers to continue to hide the truth under an ambiguous guise of rhetoric. What employer would charge an employee with lack of veracity and moral turpitude, when all he need do to avoid Due Process is make a vague charge of insubordination or failure to follow procedures. We should not be insensitive to such injustice.

Judge Templar's decision also ignores the constitutional protections afforded by Kansas' "Right to Work" laws. See Kansas Constitution, Article 15, Section 12.

Armstrong believes that he has presented a strong two-pronged argument relating to the issue of protected property and liberty interests within the 14th Amendment. He believes that he has substantially demonstrated a protected interest in both property and liberty as those terms have been construed by the high courts of this land. Armstrong was entitled to some form of hearing and an opportunity to meet the charges against him before stigma attached and irreparable damage occurred. Such hearing and opportunity were denied, and as a result prejudicial error has resulted. We ask the Court for Justice.

II

The Writ of Certiorari Should Issue to Correct the Constitutional Errors Permitted Under the Circumstances When the Trial Court's Conclusions of Law Are Inadequate and Contrary to the Law, Are Not Supported by the Findings of Facts and the Tenth Circuit Admits Constitutional Deprivations of Guaranteed Rights.

As a general proposition, public employment may not be conditioned upon the surrender of one's Constitutional Rights nor may employment be terminated for the exercise of such rights particularly where these rights vest in the First Amendment Freedoms of Speech and Association. *Perry* v. *Sindermann*, supra; *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Lontine* v. *Van Cleave*, 483 F.2d 966 (10th Cir. 1973); *Donahue* v. *Staunton*, 471 F.2d 475 (7th Cir. 1972).

The 10th Circuit in *Lontine* broadened the constitutional perimeters of Freedom of Association to include a public employee's right to participate and retain membership in a union. Thus, if Armstrong can establish beyond a preponderance of the evidence that his dismissal stemmed either from his exercise of Free Speech or from Union participation, he clearly demonstrates a violation of his Constitutional Freedoms and a deprivation of his Civil Rights under 42 U.S.C. 1983.

In determining whether or not such a violation and deprivation took place, one must initiate a four-pronged analysis of the problem. You must determine what speech is in fact protected by the First Amendment. One must then determine whether or not the public employee was discharged for exercising this protected speech or association. Next, one must determine whether or not the state

under any circumstances can infringe on employee's First Amendment freedoms. Finally, one must determine whether or not in this particular case the state has shouldered its burden of proving that a need for such an infringement exists.

The Federal Courts of this land have on several occasions made it clear that a public employee's criticism of his superiors and his comments on matters of public concern, whether or not connected with his line of work, are protected speech utterances within the protection of the First Amendment. *City of Madison Joint School District No. 8* v. *Wisconsin Employment Relations Commission*, 426 U.S. 903 (1976); *Pickering* v. *Board of Education*, supra; *Donahue* v. *Staunton*, supra; *Washington* v. *Board of Education*, 498 F.2d 11 (7th Cir. 1974); *Flynn* v. *Giarrusso*, 321 F. Supp. 1295 (E.D. Louisiana 1971); *Nebraska Department of Roads Employees Association* v. *Department of Roads, State of Nebraska*, 364 F. Supp. 251 (D. Neb. 1973).

In each of the above cases, it was held that Free Speech protections would be afforded to such activities as: letters to the editor; dissemination of bulletins; and public speeches. In general, protection was afforded to any attempt to educate the public to a matter of public concern. A close look at the findings in the case at bar reveals free speech activity paralleling that described above. In order to take their argument to the public, Armstrong and the Union he represented started a petition drive, wrote letters to the editor, and generally disseminated information to the public concerning a matter very important to them and to the public at large. Clearly, if Armstrong was discharged, expressly or inferentially, for engaging in the above activities, he was discharged for exercising his First Amendment Rights to Free Speech and Association.

In addition, many cases have come down from the Federal Courts announcing that private correspondence as well as public utterances are protected by the First Amendment Freedoms. *Gieringer* v. *Center School District No. 58*, 477 F.2d 1164 (8th Cir. 1973); *Smith* v. *Losee*, 485 F.2d 334 (10th Cir. 1973); *Rampey* v. *Allen*, 501 F.2d 1090 (10th Cir. 1974); *Bence* v. *Breier*, 501 F.2d 1185 (7th Cir. 1974).

In *Gieringer*, the 8th Circuit held that the First Amendment protected a teacher's progress report to a private teachers association. In *Smith*, the 10th Circuit had no trouble with the fact that Plaintiff's statements complained of were made not in public but at private meetings attended only by administrators and faculty. As should have been done in the case at bar, the Court in *Smith* took notice of the fact that *Smith's statements were made in his capacity as president of the Faculty Association and were expressions of opinion, not facts.* The 10th Circuit spoke again one year later in *Rampey*. In that case, the Court upheld the First Amendment Right of plaintiff teachers to freely associate with each other in private, to criticize the administration of the school and to withstand the exercise of control attempted to be asserted over them. In *Bence*, on facts very similar to ours, First Amendment protection was afforded to officers of a policeman's bargaining unit who sent a letter to city's labor negotiator outlining a proposed bargaining demand, explaining the basis for this demand, and requesting proper action if said basis for demand is found to be true.

Again the findings in the present case reveal parallel activity on the part of Armstrong which must be protected by the First Amendment. In his capacity as Union President, Armstrong sent a letter on union stationery to the Department Chief requesting a meeting to discuss such

issues as merit raises, vacations, intimidations, and firings. In light of the cases above, particularly *Bence* and *Lontine* (mentioned prior), such correspondence was clearly protected under the First Amendment. Thus if Armstrong was either expressly or inferentially fired for sending such letter, said firing was in violation of his Constitutional Rights.

The next logical step, of course, is to determine why he was fired. The Courts have been leary in accepting ambiguous reasons for the discharge of a public employee especially when the case reveals a factual backdrop loaded with concern and controversy by the state over the employee's exercise of First Amendment Freedoms. The Courts will not hesitate to pierce the state employer's veil and find that the true reasons for discharge were premised on the employee's exercise of his Freedom of Speech or Association, although such charges were not alleged. *Nebraska Department of Roads*, supra; *Washington* v. *Board of Education*, supra; *Gieringer* v. *Center School District*, supra.

In *Nebraska Department of Roads* and *Washington* the respective Personnel Departments chose not to tackle the balancing test of *Pickering*. They chose instead to predicate their dismissal charges on such abstract phrases as "insubordination" and "failure to follow proper procedure" (as in the case at hand). In addition, in each of these cases, as in the present case, there existed a factual background that made it nearly impossible to accept that plaintiff employees were coincidentally being discharged for reasons wholly unrelated to the exercise of First Amendment Freedoms. In both cases the respective District Courts pierced through the veil of these vague charges and inferred the real reason for the discharge as the exercise of First Amendment Rights.

In *Gieringer*, supra, Defendant Board of Education argued that plaintiff's dismissal rested upon his entire history of failing to get along with his superiors and not upon a report which he made to the Teachers Association. The Eighth Circuit saw through this mirage and concluded at l.c. 1166 of its opinion: "It is clear from the record that this report served as a catalyst and that without it no discharge would have occurred."

It is obvious that the Federal Courts referred to above took to heart the language of the Fourth Circuit Court of Appeals in *Johnson* v. *Branch*, 364 F.2d 177 (4th Cir. 1966). In that case plaintiff alleged she was not hired because of racial activity, while the school board gave the reason for nonretention as insubordination. The Court wisely proclaimed at l.c. 182 of the opinion:

> "TO ACCEPT . . . (SUCH REASON) WE WOULD HAVE TO PRETEND NOT TO KNOW AS JUDGES WHAT WE KNOW AS MEN." (Emphasis supplied)

The findings of the District Court below reveal an alarming concern by Olson over the firemen's campaign to take their grievances to the public. Such findings afford a solid basis for inferring that the real reason for Armstrong's dismissal was the exercise of his First Amendment Freedoms. The findings reveal that firemen, including Armstrong, were questioned concerning their union membership, how they voted on certain resolutions, the monthly dues they paid, and how often they attended meetings. What is left of *Lontine* after this infringement barrage! In addition, department supervisors were warned that they would be held accountable for "any problem children, loud mouths and rebels" who did such disgusting things as write letters to the editor or talk to City Commissioners! Letters of satisfaction were required to be written by each fireman agreeing among other things to stop completely the passing of petitions. What is left of *Goss*, *Sindermann* and *Pickering*? *It must be stressed that each of the above infringements were found as facts by the Trial Judge; that each infringement was instituted at the behest of Olson and that each infringement involved Armstrong directly*! Indeed, what were the *true* reasons behind his dismissal?

As if the above were not enough to sustain our burden of establishing by a preponderance of the evidence that he was discharged for exercising his First Amendment Freedoms, the findings of the Court below provide evidence of a direct charge based on protected First Amendment Liberties.

Mixed in among the vague charges of insubordination and improper attitude, Finding 14 conclusively reveals that Armstrong was discharged "particularly because of the threatening 'Action' letter written and delivered by him to the administration." As previously argued, such letter was a constitutionally protected correspondence. The letter was written by Armstrong in his capacity as Union president. It was written on Union stationery. It contained a request for a meeting on the issues of the day. The letter closed by saying that if the chief was not willing to meet and take action, "*ACTION* will be taken". The above was called an "action" letter because such word was capitalized. The communication was labeled threatening because the word "action" was underlined. However, no extrinsic evidence is offered either in the findings of the Trial Court nor in the record which shows that any direct action of an unlawful nature was threatened.

As just mentioned, the findings showed that the above letter was the chief reason for Armstrong's dismissal. It matters not that the letter may have been one of several factors in the dismissal, because if such letter is constitu-

tionally protected (as it is), *then the dismissal is still impermissible. Gieringer* v. *Center School District,* supra.

It thus becomes clear that Armstrong was inferentially and expressly dismissed for engaging in certain activities which have been shown to be protected under the First Amendment to the Constitution of the United States.

Having shown that he was dismissed for exercising his First Amendment Rights, it must next be asked whether or not such rights are absolute. And if not absolute, what are the interests to be balanced in favor of the arm of the state, in this case, City Manager Olson. Any answer to this question must logically begin with a discussion of *Pickering* v. *Board of Education,* cited supra.

In *Pickering,* a public school teacher was dismissed following a letter he sent to the editor of a newspaper criticizing the local board of education for their handling of a tax proposal. The teacher was fired for publishing this letter, the grounds being that its impact was detrimental to the efficient operation and administration of the schools in the district. Justice Marshall speaking for the Majority reiterated the basic proposition that teachers may not constitutionally be compelled to relinquish their First Amendment Rights they would otherwise enjoy as citizens. This is so even though, at the outset, there is no constitutional right to public employment. However, the Court did recognize that such rights as Freedom of Speech and Association are not absolute, and in the area of public employment the state has an interest to be balanced against the employee. At l.c. 568 Justice Marshall explains:

> "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and

> the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

After balancing several key factors, the Supreme Court found in favor of Plaintiff teacher stating that there must be more than a blind belief that such exercise of Free Speech is disruptive. It must be conclusively shown by the state that such statements impeded the teacher's proper performance of his daily duties in the classroom or interfered with the regular operation of the schools generally.

Several key cases have come down since *Pickering* which have carefully synthesized this decision in determining what factors to balance, the burden of coming forth with the evidence, and the necessary content that must back up the dismissal charges.

The Courts have analyzed *Pickering* to hold that the following indicia are the primary considerations to balance in determining how compelling the countervailing interests of the State really are: (1) Interest in maintaining harmony among co-workers; (2) Whether or not the protected activity impeded the employee's proper performance of his daily duties; (3) Evidence of statements so patently false and viciously made as to call into question one's veracity and competency to perform his job; and (4) Evidence of a close and personal working relationship between the employee and the person who feels that loyalty and confidence between the two has vanished. *Donahue* v. *Staunton,* supra; *Flynn* v. *Giarrusso,* supra; *Nebraska Department of Roads* case, supra; *Hostrop* v. *Board of Education,* 471 F.2d 488 (7th Cir. 1972); *Gieringer* v. *Center School District,* supra; *Rampey* v. *Allen,* supra.

Before examining the findings and record in our case to see whether or not the above indicia were considered,

certain threshold axioms must be stated. The Courts have spoken on the burden of proof issue and have announced that once a Plaintiff has proven that he was dismissed for exercising his constitutionally protected rights (as is the case here), the burden of proving a need for curtailment of such freedoms is cast upon the Defendant who seeks an exception to the rules of a free society. Defendant must assume the burden of showing that Plaintiff's acts *materially* and *substantially* interfered with the requirements of appropriate discipline in the operation of the public service. Such burden must be satisfied through clear and convincing evidence. *Smith* v. *Losee*, supra; *De Stefano* v. *Wilson*, 233 A.2d 682 (N.J. 1967). Additionally, Olson's burden here is increased because Armstrong in this case is not only a public employee but president of an employees' union. At least one case has expressed the policy that the extent of permissible criticism and First Amendment activity should be greater when said employee is not only a policeman or fireman, but is in addition president of a union. *Magri* v. *Giarrusso*, 379 F. Supp. 353 (1974).

A close look at the findings and record in the case below reveals no evidence showing that any of the key factors announced in *Pickering* were considered by the Court in its decision. There was no evidence showing disharmony among co-workers. Quite the contrary, the man accused was their union president and he held their support all the way. Nothing in the correspondence or other exercises of First Amendment activities reveals any patently false accusations or criticisms made with malice and recklessness. To the contrary, the Free Speech and Association exercised dealt with opinions and policy positions. Of even greater import is the fact that nothing in the findings or record reveal a close working relationship between Olson and Armstrong that calls for personal loyalty on a day-to-day basis as defined in *Pickering* and the cases that followed. But most important of all, there are no findings that Armstrong's exercise of his First Amendment Freedoms impeded his daily duties and performance thereof as a city fire fighter. Evidence of this latter point is extremely crucial in determining the compelling nature of the State's interest.

The crux of the charges against Armstrong were restated in the Trial Court's Finding No. 16 which in relevant part read:

> "The defendant Norris Olson, as City Manager, in taking the action set forth in Finding of Fact paragraphs 13, 14 and 15 (No. 14 containing the vague charges against the Plaintiff) did so because he BELIEVED such actions were necessary to the proper administration and operation of the Salina Fire Department. . . ." (Emphasis added)

But the law is quite clear, that mere belief absent cold and hard proof is insufficient to sustain Defendant's burden. An excerpt from the *Nebraska Department of Roads* case, cited supra, reveals the insufficiency of mere belief. The Court stated at l.c. 254:

> "Doyle thought that Kiernan's opinion of Doyle's qualifications would interfere with Kiernan's ability to perform his duties. Doyle neither knew of nor investigated Kiernan's work performance. . . . No evidence suggests that Kiernan's ability to perform his work was affected in fact by his opinion of Doyle's qualifications."

Such facts as stated above were held to be insufficient to sustain Defendant's burden in the *Nebraska Department of Roads* case.

Nor will the law accept vague and ambiguous charges such as insubordination and failure to follow accepted procedures (the crux of the charges made against Armstrong in Finding 14) as evidence of disruption, cause, or inefficiency, conditions the state must prove using the *Pickering criteria.*

In each of the cases cited above the Courts rejected such vague subterfuge and found for the Plaintiff. Such abstract terms do not provide substantial insight into the issues of work performance, harmony among co-workers and the need for close personal loyalty. They cannot sustain Olson's burden. Again citing the *Nebraska Department of Roads* case, at l.c. 255, the Court said:

> "Characterizing Kiernan's words as 'insubordination' or 'conduct unbecoming a State employee' or 'contrary to the good of the classified service' is not helpful to the defendants. The latter two items are too vague to be analytically useful and the first does not fit."

In both *Washington* v. *Board of Education,* supra, and *Hostrop* v. *Board,* supra, the respective courts rejected blind charges stating that the findings and evidence revealed no deterioration between plaintiff and his immediate supervisors so as to conclude that the expressive acts of plaintiff substantially impeded the public entity's function. In addition, neither the record nor the findings revealed the *nature* and *details* (emphasis added) of the employee's relationship with his superiors. The Courts in these two cases stressed that a disruptive effect must be shown! Vague accusations based on mere belief are inadequate to sustain Defendant's burden.

In *Donahue* v. *Staunton,* supra, the Seventh Circuit emphasized that defendants must show that plaintiff's exercise of First Amendment rights hindered him in the exercise of his everyday duty.

The 10th Circuit in *Rampey* v. *Allen,* supra, saw right through the shallow charges of divisiveness and disloyalty. In its opinion at l.c. 501, the 10th Circuit expressed the following:

> "The only inference to be drawn from a reading of this testimony is that Dr. Carter demanded absolute loyalty, required faculty members to come in and visit with him, prohibited their discussing problems of the college among themselves and prohibited their having informal discussions with students, for if they did any of these things they were considered 'divisive'."

The Court went on to recognize that there was no evidence of disruption. There was no evidence establishing plaintiff as a troublemaker. There was ultimately nothing in the record which disclosed that the activities of plaintff were in any way excessive or unduly burdensome to the school. The Court, in other words, found the situation indistinguishable from their prior case of *Smith* v. *Losee,* supra.

We urge that both *Rampey* and *Smith* are indistinguishable from the case at bar and the extensive list of cases previously cited and discussed in this argument. These cases each have a unifying theme, in that defendant's burden of showing cause to infringe on Free Speech and Association will not be and cannot be satisfied without clear and convincing evidence of the countervailing factors listed in *Pickering* and expanded in later cases. Vague accusations such as insubordination and disloyalty will not suffice to curtail one's Constitutional Rights, nor will mere belief on the part of defendant prove sufficient to sustain his burden. The findings and record are devoid of the clear and convincing evidence needed to sustain Olson's burden. Clearly error has occurred.

III

The Writ of Certiorari Will Prove That the Firing of a Union President Upon "General Charges" Conflicts With Other Decisions, and Causes an Impermissible Chill of First Amendment Freedoms by Constitutionally Impairing All Union Presidents So As to Make Them Fearful of Performing Their Union Duties.

Keith Armstrong will live on regardless of this Court's ruling upon the requested Writ. Yes, he will pump gas, be fired because of City Hall pressure, go to another job and so on. BUT, the loser in all of this will be all of us because a fateful decision here will make OTHER UNION PRESIDENTS in other cities, trades or occupations fearful to pursue legitimate union activities because of the threat of dismissal for representing your union too well.

Although we have shown that one of the reasons for Armstrong's dismissal was his exercise of First Amendment Freedoms, an impermissible reason absent a compelling reason, that here was not shown, we would feel remiss in not pointing out to the Court a further measure of injustice emanating from the decision below.

Finding of Fact 14 of the District Court's Opinion reveals the following language:

> "The suspension and discharge of plaintiff, Keith Armstrong, was based on his disregard of established administration policies, failure to follow the chain of command, insubordination, his 'demanding' attitude to his supervisors, and particularly because of the threatening 'ACTION' letter. . . ." (Emphasis supplied)

We have discussed in great detail this last charge and its First Amendment ramifications. We have also discussed the inadequacy of alleging that the preceding vague charges resulted from such Free Speech activity. But, what about the adequacy of these charges notwithstanding the Free Speech and Association claim?

In *Arnett* v. *Kennedy*, supra, Justice Marshall, joined by Justice Douglas and Brennan, filed a lengthy and vigorous dissent. One of the points that offended these jurists was the vagueness of the standard for which employees could be discharged under the Lloyd-La Follette Act. This act literally codified, as a standard, the vague phrases seen in Finding 14 of the current case. This Act developed an all-encompassing standard authorizing dismissal for "such cause as will promote the efficiency of the service". This standard the dissenting Justices found to be overly vague and broad, resulting in a chill on First Amendment rights. Justice Marshall explains at l.c. 231 of the *Arnett* opinion:

> "The dismissal standard hangs over their heads like a sword of Damocles, threatening them with dismissal for any speech that might impair the 'efficiency of the service'. . . . Because employees faced with the standard of 'such cause as will promote the efficiency of the service' can only *guess* as to what utterances may cost them their jobs, there can be little question that they will be deterred from exercising their First Amendment Rights to the fullest extent."

The same deterrent effect occurs when one can be dismissed for such vague charges as insubordination and failuse to follow proper procedures. It should matter not whether such abstractions are codified as a standard or they serve as such through custom and practice. If the right to participate in a Union, as expressed in *Lontine*, supra, has any real meaning then such a deterrence cannot be allowed under the law.

Further proof that the Federal Courts are becoming increasingly aware of the subterfuge of such charges as we have against Armstrong is expressed in the *Nebraska Department of Roads* case, *Flynn* v. *Giarrusso*, and *Bence* v. *Breier*, all cited supra.

The Court in the *Nebraska Department of Roads* case strongly asserted that charges such as insubordination and conduct unbecoming a state employee were too vague to be analytically useful. The Court in *Flynn* announced that a regulation is vague if it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. One can only guess at what constitutes insubordination or failure to follow proper procedures. In *Bence*, the Court held as vague a dismissal standard based on such phrasing as "conduct unbecoming a member" and "detrimental to the service".

The Courts should not be a party to this injustice. Standards and Charges for dismissal should be spelled out and given content. When one is left to guess what on earth may constitute such things as conduct unbecoming or insubordination, he is unconstitutionally deterred from exercising his lawful rights. He is forced into timidity. This may be what the employer wants, but this is not what the law allows.

The dismissal of public employees either for exercising their constitutional rights or on vague and abstract charges unsubstantiated in content is a very serious problem in today's active society. The problem becomes increasingly more serious when a public employee is dismissed behind a factual background of union participation and a controversial struggle to take grievances to the public. The law cannot tease such employees by granting

them ever-increasing individual and associational freedoms and then whisking them away in a cloud of rhetoric and subterfuge. This is an area open to wide abuse by the states and cities and one cannot be blind to the exercise of such abuse. Our argument shows a clear trend in piercing the veil of such abuse. The Courts have come a long way in providing safeguards to liberty and property interests by increasing the scope of such interests and by exacting a more demanding standard on the government when it wants to deprive the conferee of his benefits. The 10th Circuit has shown itself as a leader in this area with its decisions in *Smith* v. *Losee* and *Rampey* v. *Allen*. We now recognize that a property right exists in continued public employment although a state in the first instance need not constitutionally afford the benefit of public employment. Once the State comes forward with such benefit, it cannot just sweep it away. At the very least, we cannot allow a state to lay down a general policy which vests public employees with a property right and then let the same state discriminate by allowing municipalities of equal status to elect whether or not to come under the statute that insures such vesting. Municipalities of equal status must not be allowed to choose whether or not to afford Due Process. Such a scheme clearly offends notions of Equal Protection as well as Due Process itself.

We can no longer ignore the subterfuge in this area. We cannot allow admitted disimssals for exercise of First Amendment Freedoms to be counterbalanced by vague charges of insubordination, unbecoming conduct and decreasing loyalty. We also cannot ignore the stigma that attaches to such abstract charges and the ensuing ramifications on protected liberty interests of reputation, integrity and community standing, not to mention an in-

terest in future employment. We can no longer close our eyes to the chilling effect of such vague standards belying the reasons for dismissal. Without this protection the average intelligent man cannot ascertain what conduct may lead to his demise.

The District Court's opinion, as affirmed, threatens the very existence of the viability of the First Amendment Freedoms of Speech and Association. Under the District Court's opinion, the president of a public employees' union has the most uninsurable and valueless interest known to man. We cannot be blind to the injustice that has taken place. Very simply, the members of the Judiciary cannot pretend not to know as judges what they know as men.

CONCLUSION

Appellants, by their attorney, have spent a great deal in time, effort and money to research and analyze this most preciously guarded area of the law. While recognizing the overwhelming burden on our Courts today, Appellants nonetheless believe that a more detailed treatment of this case is in order. Appellants, in good faith, can not envision the distinguishing aspects of their case with several previous cases decided by the Tenth Circuit and other Federal Courts protecting the Constitutional rights and freedoms guaranteed to public employees. For that reason, they petitioned the Tenth Circuit for a rehearing and more substantial treatment of the issues. The Tenth Circuit denied Appellants the substantive statement they sought. Thus it let this important case be decided by an opinion that makes not one reference to a case cited in argument *yet readily admits that some First Amendment rights were infringed upon by Respondent!*

As said in the Good Book (Daniel 6:15), the bulwark of our Freedom lies in the unalterability of our Constitution. It is changed for no man and for no city.

Here, it has been bent by circumstances into unrecognizable propositions.

This Court can straighten the unbending Constitution and let its Writ issue to restore FREEDOM IN SALINA, KANSAS, and this man to his talented pursuits.

Respectfully submitted,

CHARLES C. SHAFER, JR.
738 Lathrop Building
A/C 816 471 2655
Kansas City, Missouri 64106
Attorney for Petitioners

APPENDIX

APPENDIX "A"

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL NO. 782, AFL-CIO; KEITH ARMSTRONG, JAMES R. MARTIN, and JACK H. GRAY,

and

GUY R. RYAN, III; LAWRENCE BRUZDA, JAMES R. TODD, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL NO. 782, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

v.

NORRIS OLSON,

Defendant-Appellee.

No. 75-1159

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

October 29, 1976

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Before LEWIS, Chief Judge; McWILLIAMS, Circuit Judge, and ZIRPOLI*, District Judge.

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*Of the Northern District of California, sitting by designation.

LEWIS, Chief Judge.

This appeal arises from two consolidated civil cases. Keith Armstrong, James R. Martin and Jack H. Gray, three former members of the Salina Fire Department and the International Association of Fire Fighters [I.A.F.F.] Local 782, brought suit against Norris Olson, the city manager of Salina, Kansas, for money damages and reinstatement as city firemen. Guy Ryan, Lawrence Bruzda, James Todd and a class consisting of all the members of Local 782 of I.A.F.F. also brought an action seeking injunctive relief against Olson. The gravamen of both these claims was that Olson had fired Armstrong, Martin and Gray for union activities and was actively restricting the rights of other firemen to participate in union activities all in violation of basic constitutional rights. The trial court found there was insufficient evidence to support plaintiffs' claims and entered judgment for Olson.

Plaintiffs appeal the judgment and order of the district court[1] urging that the court erred in relying on the vague reasons given for Armstrong's dismissal by the city and in concluding Armstrong was not entitled to the procedural due process afforded protectible interests. Plaintiffs also allege that the trial court erred because its conclusions of law were contrary to its findings of fact and established law and inadequate to support the verdict as a matter of law.

Armstrong, Gray, Martin and the other city employees of Salina were employees at will. They had no contract, commission fixed term of employment or tenure and were subject at any time to termination by the city manager.

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1. The appeal is limited to issues relating to appellant Armstrong.

A hearing prior to termination was not required by Kansas law or any regulation of Salina. At the time of the discharges complained of, it was illegal under state law for a municipality in Kansas to bargain with unions representing city employees. Armstrong, at the time of his discharge, was president of Local 782 of the I.A.F.F. The union had existed among the firemen for approximately 30 years; roughly one-half to two-thirds of the firemen were members of the union.

At a state convention of the I.A.F.F. in February of 1970 a resolution of censure of the Salina City Commission was adopted. The resolution gained statewide publicity. The city manager, Olson, then placed severe restrictions on the firemen's rights to publicly criticize the city administration. Numerous other incidents and conflicts also occurred. Because of these symptoms of unrest and the general air of uneasiness Olson finally requested the city commissioners to conduct an investigation into the affairs of the Salina Fire Department. The investigation began in the fall of 1970 and concluded in January of 1971.

The commissioners called all the Salina firemen to testify as well as the Police Chief, Fire Chief, and other city officials. At the conclusion of the investigation Armstrong was requested on January 5, to meet again with the commissioners on January 9, for the purpose of getting his ideas as to a solution. The commissioners had previously decided not to recommend action against any individual because the problems had existed over a long period of time. It should be noted that Armstrong had been involved in several of those problems. On January 7 or 8, Armstrong delivered to the Fire Chief the following letter:

Chief Lacy
222 W. Elm
Salina, Kansas 67401

Dear Chief:

The Executive Board of Local #782 has been directed by the membership to meet with you before Monday January 11, 1971.

We wish to discuss your action toward certain union members, as to merit raises, intimidations, and firing. Two other items for action are vacations, and the Western show.

The membership of Local 782 wants you to know that if you are not willing to meet, and take action, *ACTION* will be taken.

I remain,

/s/ Keith E. Armstrong
Keith E. Armstrong
President, IAFF Local 782

When the commissioners met with Armstrong on January 9, they had seen the letter, quoted *supra,* which they felt constituted harassment and a "final blow." Armstrong refused to disclose to the commissioners the number of firemen who had voted for the letter. Some commissioners testified they believed Armstrong alone had written the letter. Armstrong presented no testimony from union firemen to the commissioners or subsequently at trial, that the letter had been approved. The commissioners recommended to Olson that Armstrong be discharged after his subjective refusal to consider resignation. Olson dismissed Armstrong citing the following reasons:

> The *investigation findings were* that his lack of co-operation, insubordination and general attitude created dissension among all employees and disrupted the effectiveness of the entire department.

(Emphasis added.)

Plaintiffs urge that the trial court erred in concluding Armstrong was not entitled to the procedural due process accorded protectible interests under the fourteenth amendment. Plaintiffs have not previously contended that Armstrong's dismissal was unlawful for lack of a pre-dismissal hearing. We note that there was a pre-dismissal exchange or conference between Armstrong and the Salina City Commission. No evidence was presented as to whether this hearing might comport with due process standards. In Bertot v. School District No. 1, 522 F.2d 1171, 1177, this court held that

> The Constitution does not require a hearing before non-renewal of a non-tenured teacher's contract, unless he can show that . . . he had a "property" interest in continued employment, despite the lack of tenure . . . .

Thus, the characteristics of a "property" interest must be factually shown; there being no evidence in the record on this issue we are foreclosed from considering it.

The plaintiffs also urge that the court erred because the reasons given by Olson and relied upon by the district court in Finding of Fact No. 14 for dismissing Armstrong were constitutionally vague, chill first amendment freedoms and are in conflict with other decisions of this court. Finding of Fact No. 14 is as follows:

> In February of 1970, defendant Norris Olson did order plaintiff, Keith Armstrong, suspended for two weeks without pay, and in January 1971, defendant

> Norris Olson did discharge plaintiff, Keith Armstrong, from his employment in the Salina Fire Department. The suspension and discharge of plaintiff, Keith Armstrong, was based on his disregard of established administration policies, failure to follow the chain of command, insubordination, his "demanding" attitude to his supervisors, and particularly because of the threatening "ACTION" letter written and delivered by him to the Administration (Plaintiffs' Exhibit 12). Said letter prompted the City Commission, as part of its investigation report, to recommend his discharge from the Fire Department.

The trial court, having observed the witnesses and weighed the evidence, concluded these were the reasons for Armstrong's dismissal. Our review of the evidence indicates these findings are neither vague nor would they fall within the category of "clearly erroneous." We agree with the trial court there was insufficient evidence that the reasons given for the dismissal of Armstrong would impermissibly chill first amendment rights. We note again plaintiffs have shifted from their basic approach in the trial that Armstrong was illegally dismissed for union activity.

Some first amendment rights were infringed upon by Olson during the course of this protracted conflict in Salina. However, the evidence showed little relationship between those restrictions and Armstrong's dismissal. On the contrary, Salina eventually provided every fireman with a chance to discuss any and all problems with city officials. The case, in its appropriate appellate posture and as presented to the trial court, does not arise beyond one of factual determination. The record reflects no clear error in this regard and the judgment is accordingly

Affirmed.

APPENDIX "B"

Civil Action No. T-4880

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL NO. 782, AFL-CIO, KEITH ARMSTRONG, JAMES R. MARTIN, and JACK H. GRAY,
Plaintiffs,

vs.

NORRIS OLSON,
Defendant.

Civil Action No. T-4890

GUY R. RYAN, III, LAWRENCE BRUZDA, JAMES R. TODD, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 782, on behalf of themselves and others similarly situated,
Plaintiffs,

vs.

NORRIS OLSON,
Defendant.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

January 8, 1975

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STATEMENT

This is a consolidated civil rights case in which plaintiffs were previously employed individual fire fighters of the City of Salina, and the International Association of Fire Fighters, Local No. 782, of which individual plaintiffs had been members. The defendant in the cases is

Norris Olson, the City Manager of the City of Salina, charged with the responsibility of the administration of all the affairs of the City, including the Fire Department. Norris Olson is the sole defendant, the defendant City of Salina having been dismissed as a party.

The Pretrial Order (Doc. 27) describes the contentions of the parties and describes the issues to be considered. These need not be repeated here.

RES JUDICATA

The defendant has raised the defense of res judicata. He contends that the issues now being raised have been considered and decided in an earlier action between the parties, particularly alluding to the case of *Armstrong* v. *City of Salina*, decided by the Kansas Supreme Court and cited in 211 Kan. 333, 507 P.2d 323. This Court does not agree that the State Court case is a bar to the case at bar and overrules this defense.

DEFENDANT'S COUNTERCLAIM

The defendant has filed a counterclaim in which he seeks to have this Court determine that a personnel manual adopted by the City Council of the City of Salina consists of reasonable administrative regulations and guidelines, and their implementation and enforcement would not unreasonably restrict or infringe upon civil or constitutional rights of any employee of the City of Salina, including plaintiffs.

It is noted that this manual was adopted after the events involved in the principal action had occurred. The Court seriously questions the standing of the defendant to maintain the claim alleged in the counterclaim. The personnel manual was adopted by the City Council and not by defendant. There is no challenge of his use of the

manual. It is not an issue nor does its validity have any materiality to the issues in the principal action. This action is between citizens of Kansas. No diversity exists. A Kansas State Court, under the circumstances, should be afforded the first opportunity to pass on the questions raised. The State Court has not yet done so.

Furthermore, in the exercise of judicial discretion, this Court believes that its exercise of jurisdiction would not result in judicial economy, convenience or fairness to the parties. The Court, therefore, declines to consider defendant's counterclaim.

PLAINTIFFS' MOTION TO AMEND

Plaintiffs have asked to amend their pleadings to conform to the proof. While a formal application is not necessary, the request should indicate, under Rule 15(b), the intended scope of the amendment and give the other party to the action and the Court notice of what was intended. This, plaintiffs have not done. However, the fact that the defendant Olson allegedly made many material admissions of fact not previously known to plaintiffs does not change the issues to be determined by the Court. An amendment to conform to the proof is not deemed necessary and is, therefore, by the Court denied.

It is apparent from an examination of the record that an underlying source of the problems relating to the Salina Fire Department and its personnel was activity engaged in by some of the members of plaintiff union. Such activity by these members developed a situation which the City Commission and the defendant Olson concluded required remedial treatment. Though this is true, there are some basic principles, established by decisions of the Court of

Appeals for the Tenth Circuit, which this Court must observe.

A city fire fighter has a constitutional right to join a labor union and cannot be discharged from his employment for joining or continuing membership in a union, absent a showing of compelling state interest. *Lontine* v. *Van Cleave*, 483 F.2d 966. In this case, the Court of Appeals further held that though a public employee may not have a right to continued public employment and may not be entitled to any form of notice of hearing under state law, or under constitutional principles, he may not be suspended or dismissed for the exercise of his constitutional rights.

The *Lontine* case was followed by *Abeyta* v. *Town of Taos*, 499 F.2d 323. There, in a civil rights action, former municipal employees claimed damages and injunctive relief against the mayor, the city council, and the City of Taos, which was dismissed as a party. The facts in that case have some similarity to the circumstances before us here. In *Abeyta*, the city council decided that the Taos police department needed to be revamped. It gave the police chief 30 days to accomplish this task. He resigned and one Rivera was appointed chief in his place. Rivera discharged an officer for bypassing the chain of command and for dereliction of duty. The police commission approved the officer's dismissal and he was officially terminated by the town council. Another officer DeBaca was terminated because of violation of department rules.

Thereafter, the remaining police officers became increasingly dissatisfied with the chief's actions and policies, they sent a letter to him complaining of harassment, requesting better working conditions and demanding a meeting with the police commissioner. A meeting took place attended by the town council. The grievances were dis-

cussed and as a result of the meeting, three more police officers were suspended and other officers were placed on probation. An attorney demanded a hearing before the council, the police commission or an an impartial panel.

Though not required by statute, an impartial panel was constituted, it requested the police officers to attend meetings which lasted two weeks. Most officers attended though two who were suspended did not. On recommendation of the panel, five officers were discharged. These officers demanded reinstatement and a hearing. Their demands were ignored. The action brought by discharged and suspended officers resulted in a trial at which the trial court found: (p. 326)

> "(1) appellants were not entitled to a termination hearing because their employment was not property interest protected by due process; (2) their letter to Rivera revealed problems the town of Taos could legitimately correct by appropriate action; (3) DeBaca's termination did not conform to state law because not enough votes were cast in favor of termination, but did not merit relief; and (4) Valdez' termination, without a hearing, deprived her of due process and infringed upon her liberty because the charges against her could injure her reputation. Accordingly, the trial court ordered Valdez reinstated with back wages, but dismissed the action as to the remaining plaintiffs. Valdez has not appealed."

The Court of Appeals in affirming the trial court's rulings determined that:

> (1) The requirements of due process apply only to deprivation of interests encompassed with the 14th Amendment's protection of "property" and "liberty," and public office or employment generally is held not

to be a property interest within the 14th Amendment. At best a public employee has a mere expectation of continued employment that is not a right encompassing due process guaranties.

(2) The charges against the officers, characterized as improper job performance are not of a nature that would stigmatize or injure their reputations, as would charges of dishonesty or immorality.

(3) A public employee cannot be dismissed solely because he makes statements critical of his superiors but may be dismissed for misfeasance where the city officials find that corrective action is necessary to eliminate conditions deemed inimical to the proper administration of a public agency.

Thus, it was established that a municipal employee who has no contract or commission and no fixed term of employment, and whose employment is therefore terminable at will and who had no unilateral expectation of continued employment has no property right guaranteed by the 14th Amendment to protect. Furthermore, a letter written by municipal employees to the municipality which reveals substantive problems which are matters of public concern and town officials thereafter take corrective action, discharging the employees, such action did not establish that the employees were dismissed because of their exercise of rights of free speech, where the dismissals resulted from findings of misfeasance made by a subsequently constituted investigatory panel.

From these authorities, we must conclude that a city employee may not be discharged for the exercise of 1st Amendment rights or for criticizing his superiors, but on the other hand he has no right to continued public employment and may be discharged for reasons deemed necessary

by the elected governing body or the administrative officer charged by law with the responsibility and duty of managing and administering the affairs of the city.

It is generally held that a public employee, and particularly one serving the community as a fire fighter, does not have a full panoply of rights. He has no constitutional right to strike and may be subject, because of the protective nature of his work, to statutory anti-strike provisions.

The requirements of a fire department are very broad. There is a definite and extensive need for the viability of assignment of personnel because the department operates 24 hours per day and is the sole agency responsible for protecting the public and private property of the community from destructive conflagrations. There is need and responsibility to have at all times an alert and responsive coordinated agency employed for that purpose. A fire department takes on some aspects of a quasi-military organization because the department cannot afford the luxury of its fire fighters operating as individual units but must operate as an an entity. There must be some type of internal discipline with strict controls over the activities of all the members of the department. Fire fighters must be trained to obey orders instantly for their own safety and the safety of their fellow fire fighters.

It is fundamental that an efficient and effective fire department must be maintained at all times and that a duty exists upon those in charge of administering the affairs of a municipality to promote and maintain a harmonious relationship within such a sensitive agency so that the purpose for which the agency was created and is maintained will be responsive to its very important duties and obligations.

The bickering, the conflict and dissension among the fire fighters disclosed by the record in this case was brought

about in large part by persistent complaints and charges made by some of the plaintiffs and because of widespread public criticism of the officials and the city administration by way of the news media, letters to the public forum in the press, and the circulation of petitions among citizens to establish a fair and impartial board to investigate and make binding findings of fact concerning the suspension of fire fighter Armstrong on February 24, 1970.

Though, as heretofore indicated, a public employee may not be dismissed because he makes statements critical of his superiors, at the same time it cannot be gainsaid that the city has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the employee, as a citizen, in commenting on matters of public concern and the interest of the city, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering* v. *Board of Education*, 391 U.S. 563, 568.

In the present case, the defendant is the person charged with the responsibility of maintaining the city's interest, and hence the public interest in the fire fighters' efficiency and discipline. Such factors are essential if government is to perform its responsibilities effectively and economically. To this end, the city, through its officials, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operations and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony and ultimately impair the efficiency of an agency

such as the one we have here. Thus, the city's interest in being able to remove an unsatisfactory employee is substantial.

The Court has reviewed the evidence, has heard the arguments and statements of counsel, has read the briefs and memoranda submitted, and upon being fully advised in the premises, makes the following:

FINDINGS OF FACT

1. The plaintiffs involved in these consolidated causes are Local 782, International Association of Fire Fighters; Keith Armstrong, James R. Martin, both of whom were formerly employed as fire fighters by the City of Salina; and Jack H. Gray, a fire captain, now retired; Guy Ryan III, Lawrence Bruzda and James R. Todd, presently employed by the City of Salina, Kansas as fire fighters and representing a class consisting of all fire fighters employed by Salina who are members of Local 782. The sole defendant is Norris Olson, the City Manager of the City of Salina, Kansas. The City of Salina is no longer a defendant, having been dismissed, and all parties are either employed by or were formerly associated with the City of Salina in some capacity.

2. At all times material in these consolidated actions, the City of Salina, Kansas, has been a city of the first class, operating under the city manager form of government and the defendant Norris Olson has been continuously serving as City Manager thereof. Said City Manager is the sole defendant in these actions.

3. There are no rules, regulations, statutes, ordinances or any like provisions which prevent fire fighters from any of the following actions:

(a) Writing letters to City Commissioners,

(b) Writing letters to news media,

(c) Preparing, signing and/or passing initiative petitions relating to any subject, including changing the form of city government, the City Manager, or replacing the City Manager,

(d) Talking to or contacting city or state elected officials, or

(e) Any of the foregoing being done by the wives, children or families of fire fighters.

4. Under date of January 6, 1971, Armstrong signed as the president of, and wrote the following letter on, Local 782's letterhead, the letter being referred to during the trial as the "action" letter:

"Chief Lacy,
222 W. Elm
Salina, Kansas 67401

Dear Chief,

The Executive Board of Local # 782 has been directed by the membership to meet with you before Monday, January 11, 1971.

We wish to discuss your action toward certain union members, as to merit raises, intimidations, and firing. Two other items for action are vacations, and the western show.

The membership of Local 782 wants you to know that if you are not willing to meet, and take action, *ACTION* will be taken.

I remain,

/s/ Keith E. Armstrong
Keith E. Armstrong
President IAFF Local 782"

5. The City Government of Salina, Kansas, is conducted by five elected commissioners, one of whom is designated as Mayor.

Under laws applicable to the City, the commissioners set and determine the policy of the City, leaving the administration of such policy strictly and solely in the Manager's hands.

The City Manager serves at the appointment and during the pleasure of the City Commissioners.

6. City Manager Olson, acting under authority provided him by the City Charter, requested the City Commissioners to conduct a hearing as to the problems in the Fire Department.

The investigation commenced in the fall of 1970 and was concluded in January of 1971.

All members of the Fire Department, the Fire Chief, Police Chief, Director of Safety, City Manager and other city officers were called as witnesses.

Only the individual under interrogation, plus the commissioners and reporter were present during each questioning.

All statements made were recorded by court reporters who later transcribed the testimony. Many of the individual transcripts of the testimony were received in evidence during the week long trial.

No attorneys were allowed to be present and all persons were promised that their statements would be kept confidential in order to induce the greatest amount of testimony, whether it be truth or hearsay.

7. Nearly every fire fighter was asked about his union membership, how many attended union meetings, what was said, and the like.

In an effort to shorten the trial, the attorneys for the parties stipulated:

That if the remaining 42 members of the Fire Department whose names appeared on the stipulation were called to testify, each would state that he was asked one or more of these questions at the Commission hearing:

(1) Are you a member of Local 782?

(2) Did you vote on the censure resolution or have an opportunity to do so?

(3) How long have you been a member of 782?

(4) What are the monthly dues to belong to 782?

(5) How many men attend union meetings?

(6) How many Salina fire fighters belong to local 782?

8. A meeting was conducted on February 5, 1970, by City Manager Olson. In attendance were the McCabe brothers, Lacy, Harris, Dunn, Bross, Vaupel, Gray, Glendening, all fire fighters, plus 9 other department heads and the City Attorney.

Olson conducted the meeting and gave out copies of his memorandum entitled "Summary of Meeting Conducted by the City Manager, February 5, 1970, relative to personnel and supervisory problems within the Fire Department." The memorandum was received in evidence as Plaintiffs' Exhibit 9.

Exhibit 9 was a nine page document on legal size paper and it dealt mainly with Fire Department matters.

Chief among the instructions given by Olson were these:

Paragraph	Covering
7-(m)	The supervisors would be held accountable for the actions and/or acts of personnel under them, including . . . writing letters to the editors, issuing complaints to commissioners, etc.
7-(o)	Failure to discharge your responsibilities may result in disciplinary action for self or men. Such action to include reprimand, probation, demotion, suspension, discharge of any combination with or without pay.
7-(u)	If you have any problem children, know it alls, loud mouths, rebels, etc., if they don't fit, recommend they be turned out to pasture.
8	If union gets into trouble, the only recourse is to deal with the officers of the union.

All present were told to write "satisfaction letters" indicating they liked their jobs or be fired.

A fair analysis of the instructions as given and understood by those receiving Plaintiffs' Exhibit 9 clearly indicates that Olson fully intended that the petitions and writings be stopped or the men were to be fired.

9. At a meeting conducted by Olson in his office on February 11, 1970, Olson, Harris, Lacy, Hobart McCabe, and all Fire Captains were present. Also present from the union were fire fighters Armstrong, Kriegh, Wright, Bowels, and Labbe.

Armstrong had sent a request through "chain of command" asking for a meeting between the Manager and the Union.

Olson opened the meeting demanding to know if the Union or Fire Department had requested the meeting. When Armstrong tried to answer, Olson told him to shut up.

During the meeting, whenever Armstrong tried to talk, Olson told him to shut his mouth or be thrown out of the meeting.

Again, Olson wanted letters of satisfaction with jobs to be written. He produced files showing backgrounds and former jobs of fire fighters and discussed such information freely.

The men were warned by Olson that if they discussed the situation or went to commissioners, he would change their work schedule so they would have to work longer hours.

10. At a meeting conducted by Hobart McCabe, Director of Safety, on March 13, 1970, Lacy, Captains Dunn, McCabe, Bross, Glendening, Vaupel, Assistant Chief Nichols and Lt. Freeman were present.

Those present were told by McCabe to get petitions off streets by 8:00 a.m. or be fired.

They were also told that he must interview each man on the shift and ask them to fill out questionnaires like Plaintiffs' Exhibits 4, 18 and 35.

Captains had to write back letters indicating compliance by all men or the captains would be fired.

Letters recommending the firing of Caswell, Armstrong, Martin, Tinkler and others were written by Captains.

They were told to tell men they could not write letters to editors and were advised that the initiative petitions violated department procedure.

Every man to be responsible for his wife's actions, and no letter writing or talking to commissioners.

Captains must do their job as he outlined or be fired. Anyone striking would automatically be fired.

All this was done to comply with Olson's instructions of February 5, 1970, Exhibit 9.

11. The questionnaire arising out of the meeting of March 13, 1970, generally covered the following questions:

1. Are you happy with your job?
2. Do you think about your income and what you would do if you lost your job?
3. If you are passing petitions, will you stop?
4. Will you strike?
5. Will you help Lacy and others build a better department?
6. Do you want to be a fireman?

12. In the matter of granting "merit" pay increases to City employees the defendant Norris Olson, as City Manager, relied upon the recommendations submitted by the supervisory heads of the different City departments, including the Fire Department of the City of Salina. There is no evidence that the defendant Norris Olson himself denied any plaintiff a "merit" increase because such employee hired attorneys nor that he denied to any of them any "merit" pay increases recommended by the supervisory departmental heads, James Lacy and Hobart J. McCabe.

13. Plaintiff, Jack H. Gray, was given the choice of retirement or dismissal in October 1970, by the defendant Norris Olson. Plaintiff Gray elected to retire and has ever since been receiving full retirement benefits and has not been an employee of the City of Salina since such retirement. The action taken by the defendant Norris Olson was based on the recommendation of Fire Chief Lacy. The recommendation was made because of plaintiff Gray's incompatibility with the Fire Department in not attempting to get along with his supervisors, his inability or refusal to discipline his men for the inefficient performance of their department duties, and because of his inability to run an overall smooth shift and did not communicate or cooperate with his supervisors on the problems existing on his shift.

14. In February of 1970, defendant Norris Olson did order plaintiff, Keith Armstrong, suspended for two weeks without pay, and in January 1971, defendant Norris Olson did discharge plaintiff, Keith Armstrong, from his employment in the Salina Fire Department. The suspension and discharge of plaintiff, Keith Armstrong, was based on his disregard of established administration policies, failure to follow the chain of command, insubordination, his "demanding" attitude to his supervisors, and particularly because of the threatening "ACTION" letter written and delivered by him to the Administration (Plaintiffs' Exhibit 12). Said letter prompted the City Commission, as a part of its investigation report, to recommend his discharge from the Fire Department.

15. In January of 1971, defendant Norris Olson did discharge plaintiff James Martin from his employment in the Fire Department of Salina. The discharge resulted because of plaintiff Martin's failure to cooperate with the Fire or Police Departments. Plaintiff James Martin did not appear in this trial, did not testify herein and offered no evidence.

16. The defendant Norris Olson, as City Manager, in taking the action set forth in Findings of Fact paragraphs 13, 14 and 15 did so because he believed such actions were necessary to the proper administration and operation of the Salina Fire Department. Said actions, and each of them, were done by defendant Norris Olson in the performance of his administrative and governmental functions as City Manager of Salina.

17. The City of Salina, Kansas, has had a Fire Fighters Union continuously for approximately 30 years. All of the plaintiffs who testified at one time or another belonged to the Salina Fire Fighters Union. Hobart J. McCabe, Director of Safety, James Lacy, Fire Chief, and the Fire Captains who testified, all had, in fact, belonged to the Fire Fighters Union at one time or another. None of the plaintiffs nor any other witnesses were suspended or discharged because of union membership.

18. The Board of City Commissioners, the governing body of Salina, between October 1970 and January 1971, at the request of the defendant Norris Olson conducted an investigation into the affairs of the Salina Fire Department because of the air of unrest prevailing in the community. The atmosphere of unrest was partially created by the conduct of certain members of the Fire Department, which conduct included the resolution of censure of the City Commission of the City of Salina (Defendant's Exhibit C) which gained statewide publicity through the news media and the circulation of the petition seeking union recognition as part of a Fact Finding Board to make Finding of Fact binding upon the City (Plaintiffs' Exhibit 1). Because of the state wide publicity the air of unrest and turmoil in the community, and, because of the request of the defendant Norris Olson, the Salina City Commissioners determined it was necessary to investigate into the affairs of the Fire

Department to determine the cause of the unrest and turmoil.

19. At all times prior to the filing of these actions, the individual plaintiff employees in the Fire Department of the City of Salina accepted and cashed each of their payroll checks without protest.

20. Each Finding of Fact set forth in the foregoing Findings of Fact deemed to be a Conclusion of Law is hereby found to be a Conclusion.

CONCLUSIONS OF LAW

1. The defendant, Norris Olson, as City Manager of the City of Salina, Kansas, a city of the first class, operating under the Commission-Manager form of government, is charged with the governmental duties and responsibilities for the management and administration of all of the affairs of the City of Salina. Included within said governmental duties is the exclusive duty and power to appoint and remove heads of departments and all subordinate officials and employees as may be necessary to the efficient operation of the city's business.

2. Throughout the period of time material to these actions and while employed in the Fire Department of Salina, Kansas, each of the individual plaintiffs was an employee at will, subject to termination by himself or by defendant Norris Olson, as City Manager.

3. The so-called "meet and confer" law (K.S.A. 75-4321, et seq., 1971 Supp.) was enacted by the Legislature April 9, 1971, to become effective March 1, 1972. Under the provisions of said law, the City of Salina, Kansas, is given the option of electing to come under the Act through formal action by its governing body. Until such action is taken, the City of Salina is not bound by the provisions

thereof. To date, the governing body of Salina has not made the election to come under the provisions of the Act. (See K.S.A. 75-4321, 5(c).)

4. Plaintiffs have failed to establish the claim asserted by a preponderance of the evidence and, therefore, judgment should be entered as follows:

(a) In favor of the defendant against the plaintiffs for the money damages and attorneys' fees;

(b) In favor of the defendant against the plaintiffs on the question of injunctive relief and such relief is therefore denied.

(c) Defendant is entitled to judgment for his costs.

5. Each Conclusion of Law set forth in the foregoing Conclusions of Law deemed to be a Finding of Fact is hereby found to be a Finding of Fact.

Defendant's counsel will prepare, circulate and submit form of judgment to be hereafter entered by the Court.

APPENDIX "C"

Constitution of the State of Kansas

Article 15, Section 12

Membership or nonmembership in labor organizations. No person shall be denied the opportunity to obtain or retain employment because of membership or nonmembership in any labor organization, nor shall the state or any subdivision thereof, or any individual, corporation, or any kind of association enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of membership or nonmembership in any labor organization.

APPENDIX "D"

Kansas Statutes

K.S.A. 12-1011

12-1011. Same; powers and term of manager. The administration of the city's business shall be in the hands of a manager. He shall be appointed by the commission, and shall hold office at the pleasure of the board.

K.S.A. 12-1014

12-1014. Same; duties and functions of manager; civil service commission in certain cities; appointments. The manager shall be responsible for the administration of all of the affairs of the city. He shall see that the laws and ordinances are enforced. He shall appoint and remove all heads of departments, and all subordinate officers and employees of the city. All appointments shall be made upon merit and fitness alone: *Provided,* That if any city operating under the commission form of government adopts the city manager form of government, after January 1, 1947, and at the time of such adoption has a civil service commission, said commission shall have a right to serve out its present time and such city shall continue to have a civil service commission and such civil service commission shall determine the merit and fitness of any and every person appointed to any position within the jurisdiction of the civil service commission, as established by the laws of 1913, chapter 88 [*], and acts amendatory thereto: *And provided further,* That no officer or employee who is under civil service at the time of the adoption of the city manager form of government shall be discharged or removed from the office or position of employment he holds

at the time of such adoption, except for cause, and then only in the manner prescribed by the civil service law in force at the time such removal or discharge is sought. In all cities adopting the city manager form of government, in which no civil service law is in force at the time of such adoption after January 1, 1947, the manager shall have the option to require the appointment of the civil service commission as established by the provisions of section 13-2201 of the General Statutes of 1935 and any amendments thereto.

The governing board at the request of the manager, shall appoint civil service commissioners as is now or may hereafter be provided for by law for cities of the state of Kansas. He shall be responsible for the discipline of all appointive officers, and may, without notice, cause the affairs of any department or the conduct of any officer or employee to be examined. He shall prepare and submit the annual budget to the governing body and also keep the city fully advised as to the financial conditions and needs of the city. He may make recommendations to the commissioners on all matters concerning the welfare of the city, and shall have a seat, but no vote, in all of the public meetings of the governing body.

No member of the city commission shall directly interfere with the conduct of any department, except at the express direction of the commission: *Provided, however,* That all cities having a population of over one hundred thousand, owning an electric-light plant, a water-works plant, a municipal airport or other public utilities, which utilities are operated, managed and controlled by a board of public utilities as provided by chapter 126 [‡] of the laws of Kansas for 1929, and all acts and parts of acts amendatory thereof, the utilities herein enumerated, as well as other utilities, shall be managed, operated and

controlled by such boards of public utilities and the city manager shall have no jurisdiction or control over said utilities.

K.S.A. 13-772

13-772. Same; application of act; appointment of commissioners; qualifications; terms. The governing body of cities of the first class shall appoint three civil service commissioners, who are citizens of the United States and who have been residents of such city for at least five years immediately preceding such appointments, who shall hold office, for a term of four years. Not more than two members of said civil service commission shall be members of the same political party and no person, while serving as said civil service commissioner shall hold or be a candidate for any office of public trust.

The three commissioners appointed in accordance with the provisions of this act shall constitute the civil service commission. This act shall apply to all cities of the first class who were operating under the provisions of this act prior to January 1, 1942, and to all cities of the first class that may elect to operate under the provisions of this act, by resolution unanimously adopted by the governing body. The commissioners appointed and serving in all cities now operating under this act shall hold office until their respective terms expire.

K.S.A. 13-788

13-778. Same; removal or reduction in rank for cause; statement of reasons; answer; hearing; appeal to district court. No officer or member of any fire department within the terms of this act shall be removed, discharged or reduced in rank except for cause, and in no event until

he or she shall have been furnished with a written statement of the reason for such action. In every case of such removal or reduction a copy of the statement of reasons therefor and answer thereto, if the person sought to be removed desires to file such written answer, shall be furnished to the commission and entered upon its records.

If the person sought to be removed or reduced shall demand it, the commission shall grant the person a public hearing, which hearing shall be held within ten days from the filing of the charges, in writing, at which time such member may appear, by himself, herself or counsel, or both. At such hearing the burden shall be upon the removing officer to justify his or her action. In the event the commission fails to justify the action of the removing officer, then the person sought to be removed or reduced shall be reinstated with full pay for the entire period during which he or she may have been prevented from performing his or her usual employment and no charges shall be officially recorded against the person's record.

In the event the commission shall sustain the action of the removing officer the person removed shall have an immediate right of appeal to the district court of the county in which said city is located; said appeal shall be taken within ninety days from the entry by the civil service commission of its final order, and said district court shall proceed to hear the appeal upon the original record taken therein and no additional proof shall be permitted to be introduced. The district court's decision shall be final.

APPENDIX "E"

Code of the City of Salina, Kansas

Section 2-75

The commission shall, whenever by virtue of a vacancy in said office it becomes necessary, appoint a manager who shall be responsible for the administration of all of the affairs of the city, and hold office at the pleasure of the board. The manager shall be chosen solely on the basis of administrative ability and the choice shall be not limited by any residence qualifications.

Section 2-77

Sec. 2-77(1). The manager shall be responsible for the administration of all of the affairs of the city.

Sec. 2-77(2). He shall see that the laws and ordinances are enforced.

Sec. 2-77(3). He shall appoint and remove all heads of departments and all subordinate officers and employees of the city. All such appointments shall be made upon merit and fitness.

Sec. 2-77(4). The manager shall have the option to require the appointment of a civil service commission as established by the provisions of K.S.A. 13-2201. The board of commissioners at the request of the manager, shall appoint civil service commissioners as is now or may hereafter be provided for by law for cities of the State of Kansas.

Sec. 2-77(5). He shall be responsible for the discipline of all appointive officers and may, without notice,

cause the affairs of any department or the conduct of any officer or employee to be examined.

Sec. 2-77(6). He shall prepare and submit the annual budget to the board of commissioners and also keep the board of commissioners fully advised as to the financial condition and needs of the city.

Sec. 2-77(7). He may make recommendations to the commissioners on all matters concerning the welfare of the city, and shall have a seat, but no vote, in all of the public meetings of the board of commissioners.

Sec. 2-77(8). He shall perform such other and further duties as may be required by law or ordinance.

Section 2-78

The administration of the city's business shall be in the hands of the manager.

APPENDIX "F"

Personnel Manual of Salina, Kansas

Chapter 4, Section IV-2

Any employee may be dismissed for just cause. Such action shall be taken only when other forms of disciplinary action or penalties are deemed inappropriate or have proven ineffective in dealing with the particular employee. The department head shall make written recommendation to the City Manager for approval of any dismissal. The employee shall be notified, in writing, of the reason for his dismissal.